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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 726

STATE, *ex rel.* RALPH IAUS,

Appellant,

vs.

WILLARD A. CARLTON, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

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In the Supreme Court of the United States

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APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

REPORTS OF OPINIONS.

The Supreme Court of Ohio rendered an opinion which is reported in Volume 168 O. S. 279 (1958), and the Court of Appeals, Seventh District, Portage County, also rendered an opinion (1957) which has not been officially reported, copies are attached hereto as Appendix "A" and "B" respectively.

JURISDICTIONAL GROUNDS.

The following is a brief outline of the grounds upon which the jurisdiction of this Court is invoked:

1. The Appellant brought his action for a writ of mandamus against the Zoning Inspector and the Township

Trustees seeking an order for a zoning certificate to use his five acres of vacant farm land and construct a building for the sale of hardware and lumber, wholesale, on the ground that the Zoning Resolution, in its entirety, controlling the use of all land and buildings within the Township, is arbitrary, unreasonable and capricious, and has no real or substantial relation to the public health, safety or morals and general welfare, and that it constitutes a cloud and lien on his property, and a taking without Due Process of Law, in violation of the 5th and 14th Amendments of the Federal Constitution; that it is repugnant to, both, the Federal and Ohio Constitutions; that it is not in conformity with the State Township Enabling Act, R. C. O. Sections 519.01 to 519.99 inclusive; that Sections 519.13 and 519.14 of said State Township Enabling Act violates the provisions of the State and Federal Constitutions and decided cases.

2. The Supreme Court of Ohio decided the case and affirmed the judgment of the Court of Appeals on November 19, 1958, and that an Application for Rehearing was filed in due time and denied on December 10th, 1958; that on January 2, 1959, Notice of Appeals to this Court was filed with the Supreme Court of Ohio.

3. The jurisdiction of this Court upon appeal is conferred by 28 U. S. C. Sec. 1257 (2). Appellant challenges the validity of an alleged Comprehensive Township Zoning Resolution of Mantua Township, Portage County, Ohio, "a statute of a State" within the meaning of 28 U. S. C. Sec. 1257 (2), on the ground that the validity of said Zoning Resolution was drawn in question throughout all proceedings herein and the decision of the highest State Court was in favor of its validity; that the Zoning Resolution of its own force operates unconstitutionally to reduce the value

of his land, destroy its marketability; that it constitutes an invasion of his property rights, a taking without Due Process of Law, and is repugnant to the Federal Constitution, Art. I, Sec. 10, and the 5th and 14th Amendments thereto; that Sec. 519.13, 14 of said State Township Enabling Act is also drawn in question as being repugnant to the provisions of the State and Federal Constitutions.

4. Cases believed to sustain the jurisdiction of this Court on Appeal include: *Konigsberg v. State Bar*, 353 U. S. 252; *Craig v. Harvey*, 331 U. S. 367; *Greenough v. Tax*, 331 U. S. 486; *Michigan v. Calvert*, 347 U. S. 157; *Paulos v. New Hampshire*, 345 U. S. 395; *McCollum v. Board*, 333 U. S. 203; *Winters v. N. Y.*, 333 U. S. 507; *Tyson v. Banton*, 273 U. S. 418; *Indiana v. Brand*, 303 U. S. 95; *King v. Augusta*, 277 U. S. 100; *Nebbia v. N. Y.*, 291 U. S. 502; *Jamison v. Texas*, 318 U. S. 413; *Euclid v. Ambler*, 272 U. S. 365; *Zucht v. King*, 260 U. S. 174; *Municipal v. Birmingham*, 316 U. S. 153.

5. The alleged Comprehensive Zoning Resolution together with the attempted amendments are not officially reported, are attached hereto as Appendix C-1, C-2, C-3 and C-4; that the State Township Enabling Act, R. C. O. Sec. 519.01 to 519.99 is attached hereto as Appendix D. These documents are too long to be set out verbatim. C-1 is the original comprehensive zoning text; C-2 sets out some minor changes and C-3 and C-4 amongst other items extend the "Commercial C Districts" on State Route No. 82, to the vicinity of the Appellant's property. Appendix E attached hereto includes, Sections 2731.01, 2731.02, and 2505.30, 503.12, 505.01, 507.01 and 509.01 of the Revised Code of Ohio, and also Sec. 2, Art. X of the Ohio Constitution; we also include the relevant Journal Entries of the Courts below as (Appendix M, p. 73).

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

1. Whether the Mantua Township Zoning Resolution, controlling the use of all real estate within its boundary, is valid and Constitutional: (a) when it fails to provide for height districts; (b) when it fails to provide for a legally constituted Board of Zoning Appeals with power to make variances in specific cases, under criteria or standards to guide and control its action; (c) when it prohibits the sale of hardware and lumber on his vacant farm land fronting on State Route No. 82 where Commercial Uses are permitted, but the Appellant's land is restricted to residential purposes only, without any real or substantial relation of the public health, safety, morals and general welfare; (d) when it fails to comply in many other respects with the provisions of the State Township Enabling Act, violates the provisions of the State and Federal Constitutions, 5th and 14th Amendments.

2. Whether the refusal of a zoning certificate by the Zoning Inspector, in charge of issuing certificates, without appealing to the Board of Zoning Appeals is final and fatal to the right of writ of mandamus; (a) when the attack is made against the Zoning Resolution in its entirety; (b) when it is claimed that the Zoning Resolution did not provide for a legally constituted Board of Zoning Appeals with power to grant relief, as applied to the Appellant's claim; (c) when the provisions of the Township Zoning Resolution, expressly made separable any section thereof declared invalid, is repugnant to the provisions of the State and Federal Constitutions and decisions of this Court.

3. Whether the State Township Enabling Act, Sec. 519.13 and 519.14 authorizing the Township Trustees to

appoint rather than elect members to the Township Board of Zoning Appeals (a) when it conflicts with the provisions of Sec. 2, Art. X of the State Constitution which requires Township Officials be elected by its electors; (b) when it fails to provide for standards or criteria to guide and control the action of Township Board of Zoning Appeals, violates and is repugnant to the provisions of the Ohio Constitution, and 5th and 14th Amendments of the Federal Constitution.

STATEMENT OF THE CASE.

The following facts, we believe, are material to questions presented:

1. The appellant presented to the Township Zoning Inspector, in charge of issuing zoning certificates, his application, plans and specifications and the required fee and requested a certificate to use his five acres of vacant farm land, located and fronting on State Route No. 82, an undeveloped area of the township, to construct a building and use the land for the sale of hardware and lumber, wholesale. The certificate was denied because Appellant's land was zoned for residential purposes only, although, in all other respects, the application plans and specifications were approved.

2. The Appellant filed his petition with the Court of Appeals, against the Zoning Inspector and Township Trustees seeking a writ of mandamus to require them to issue the certificate and alleged to the effect that the provisions of the State Township Enabling Act, R. C. O. Sec. 519.13 and 519.14 and the Mantua Township Zoning Resolution are in direct conflict with the Ohio Constitution, Sec. 2, Article X; that the Township Zoning Resolution and the amendments fail to conform with the State Township Enabling Act are void, illegal and unconstitutional,

repugnant to Art. I, Sec. 19 of the Ohio Constitution and the 5th and 14th Amendments of the Federal Constitution; that the said resolution creates cloud and lien upon said property, reduces and destroys its market value, and further that the Appellant has no other remedies in the usual course of the law, and that Zoning Resolution and amendments are attached and made a part thereof.

3. The Appellees, in their joint answer, alleged to the effect:

(a) Appellant failed to allege a cause of action;

(b) Appellant had other remedies, to-wit, by appeal to the Board of Zoning Appeals on the Zoning Inspector refusal to issue a zoning certificate, and in turn the Board's decision, if adverse, could be appealed to the Court of Common Pleas;

(c) The Zoning Inspector "* * * *has exercised, in his discretion, his powers as to said application for a building and use permit and that pursuant to the authority vested in him by Mantua Township Zoning Resolution, he denied said application. The exercise of discretion imposed upon said Zoning Inspector, having now been exercised, the Writ of this Court to compel exercise of discretion would be a vain act*;" * * *

(d) That the trustees have performed all duties incumbent upon them relative to the application;

(e) General denial. (Appendix "L," p. 71.)

Appellant demurred to the joint answer, and appellees demurred to the petition.

The case was tried on the Appellant's amended petition and the Joint Answer of the appellees. The Appellant's evidence consisted of oral testimony, documentary evidence and stipulations. (Appendix pp. 70 and 73, K and M, Bill of Exceptions and Stipulations.)

Appellees offered no evidence.

RAISING THE FEDERAL QUESTIONS BELOW.

1. The Federal Questions were raised by the petition and orally during the trial in the Court of Appeals; in the Supreme Court by the Assignment of Errors and at the oral hearing.

2. The Court of Appeals denied the writ and wrote an opinion (Appendix B, p. 23) and stated, amongst other things:

(a) In passing upon the Federal questions, "As to all other errors complained of we find no merit."

(b) On the Appellees challenge to our right to a writ of mandamus it held "—that the relator may seek relief under mandamus and pursue his action."

(c) All questions with regard to the Board of Zoning Appeals is disposed of: "Members of the Board of Zoning Appeals are Public Officials—" and "—The trustees appointed the Zoning Board under power conferred by statute, and the statute is not in contravention of the Constitution."

(d) "Under the state of the pleadings and the record before us we are unable to say that the resolution is unconstitutional."

Refusal to Make Separate Finding of Facts and Law.

3. In conformity with R. C. O. Sec. 2505.30, amended September 30, 1955, which is applicable to the Court of Appeals only, the Appellant filed his application asking the Court to find separately the facts and conclusions of law. The Court admitted that timely request was made but the application denied. The Court cited as its authority for the refusal Sec. 2315.22 R. C. O. and *State ex rel. Gordon vs. Zangerle*, 136 O. S. 371, when neither of these are applicable to the case at bar. Section 2315.22 of the Ohio Revised Code has reference to the Court of Common

Pleas only and the *Zangerle* case was brought up to the Court of Appeals on an agreed statement of facts from the Court below, whereas, the case at bar was originally tried in the Court of Appeals on the pleadings and evidence.

Decision of the Supreme Court of Ohio in Conflict with Decision of this Court.

4. The Supreme Court of Ohio affirmed the judgment of the Court of Appeals and rendered an opinion (Appendix "A" p. 21) wherein it made no reference to the constitutional questions raised in the Court below, and by Assignment of Errors in that Court. The Supreme Court of Ohio, in the case at bar, held, to the effect:

> That a party cannot procure a writ of mandamus for a building permit and at the same time claim that the zoning resolution is unconstitutional, without first appealing to the Board of Appeals;
>
> That the Zoning Inspector's refusal to issue a permit, no further duty remained to be done by him;
>
> That the Township Trustees have no duty to perform.

In *Ice & Fuel vs. Krauzweiser*, 120 O. S. 352, the Court held that an officer in charge of issuing permits has no discretionary power and that it is his plain duty to follow the law. Does his obligation end on his refusal to issue a zoning certificate when subsequently the court determines that the zoning Resolution was void and unconstitutional. The Supreme Court; in the case at bar, held in the affirmative.

In plain and simple language of the State Township Enabling Act, Sec. 519.01 etc. R. C. O. the Township Trustees are directed to adopt a comprehensive Zoning Resolution and appoint a zoning inspector. Who is the Township if not the Trustees? 39 *Oh. Jur.* Sec. 39, p. 300.

Simple logic and good law holds that when an agent is unable or refuses to perform a duty, the principal may perform such duty; that was our reason for making the Trustees party defendants. If the appellant had omitted the Trustees as defendants, appellees would have claimed that we could have had our relief from the Trustees had we made them party defendants.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

The Federal questions presented herein are so substantial as to require plenary consideration of this Court, but having in mind the ruling in the *Hadacheck vs. Los Angeles*, 239 U. S. 394, paragraph 10 of its syllabus, "Whether an ordinance is within the charter power of the city or valid under the state constitution are questions of state law," it is our duty to first make a showing that the zoning resolution and a portion of State Township Enabling Act are in conflict with the state laws and constitution, as follows:

Townships Have No Constitutional Police Power.

1. In Ohio, cities with and without charters have inherent constitutional police power (*Yorkavitz v. Twp. Trustees*, 166 O. S. 349, 351), in addition to the powers derived from specific State Enabling Acts; that Townships have no inherent constitutional police power and derive their authority to adopt zoning regulations from recently enacted Township Enabling Act, Sec. 519.01 to 519.99 (Appendix "D" p. 46.) In this respect Ohio differs from other states, for instance, in the State of California, cities, villages, township boards and other governmental agencies derive their police power from a State Enabling Act and under its constitution.

Comprehensive Zoning Regulation.

2. The Ohio State Enabling Act, Sec. 713.06 etc., pertaining to the zoning of cities, provides amongst other things that cities, adopting zoning ordinances include in its comprehensve zoning plan, "height districts" Board of Zoning Appeals and proper enforcement and penalties. In the *Pritz vs. Messer* case, 112 O. S. 628, considering the minimum requirement under the provisions of the State Enabling Act pertaining to cities and the Ohio Constitution, the Court held:

> Syl. 2. "An ordinance enacted by a municipality under Article XVIII, Section 3, of the Ohio Constitution, and under Sections 4366-1 to 4366-12, General Code, dividing the whole territory of the municipality into districts according to a comprehensive plan which, in the interest of the public health, public safety and public morals, regulates the uses and the location of buildings and other structures and of premises to be used for trade, industry, residence, or other specific uses, *the height, bulk*, or location of buildings and other structures thereafter to be erected or altered, including the percentage of lot occupancy, setback of building lines, and the area of yards, courts and other spaces, and for such purpose divides the city into zones or districts of such number, shape, and area as are suited to carry out such purposes, and *provides a method of administration* therefor, and *prescribes penalties*, for the violation of such provisions, *is a valid and constitutional enactment*."

3. We must now consider whether a Township without any inherent constitutional police power, by virtue of the State Township Enabling Act, Sec. 519.02 R. C. O. etc., authorizing township Board of Trustees to adopt zoning regulations is required to adopt a *comprehensive zoning plan*. In *Cassell vs. Board*, 163 O. S. 340. the Court held:

"Syl. 1. Sec. 519.02, which authorizes Board of Trustees of any township to zone areas within such township, *requires that such zoning regulations be in accordance with a comprehensive plan.*"

Township Zoning Resolution Unconstitutional.

4. We have shown that the Mantua Township Zoning Resolution fails to provide for height districts, Board of Zoning Appeals, enforcement provisions and penalties, contrary to the requirement of State Township Enabling Act, Sec. 519.01, etc. If the resolution is not a comprehensive plan, fails to conform with Township Enabling Act, and fails to contain the minimum requirement imposed upon cities, it is evident that such township regulation is void.

5. The Mantua Township Resolution, Sec. 2, "Residence R Districts" paragraphs A to L inclusive prohibits the use of Appellant's property for business and restricts its use to residential purposes of single, two families, churches, police and fire stations, institutions, hospitals, etc. Pleadings and evidence established the fact that the appellant's property was located and fronting on State Route No. 82, vacant farm land; that the resolution, while limiting the appellant's property to residential use only, allowed on State Route No. 82, nearby appellant's property "Commercial C Districts," or commercial uses. We further claimed that the restriction on our property is arbitrary, unreasonable and capricious and has no real or substantial relation to public health, safety, morals and general welfare.

6. Mantua Township, by virtue of the State Township Enabling Act, is authorized to adopt a comprehensive zoning plan; to provide for residential districts and exclude all commercial uses and all elements that are attracted to commercial uses. Appellant's property fronts on State Route

No. 82, a main highway in the State of Ohio, running through the township of vacant and undeveloped farm land and used by all kinds of heavy traffic; the resolution extended the commercial district to nearby the appellant's property. All uses contemplated by law as objectionable in residential districts are present and surround the appellant's property, therefore, the restrictions involved herein have no real or substantial relation to the public health, safety, morals and general welfare and void. In *Pritz vs. Messer*, cited herein, the court held:

> Page 637. "Even if the municipality has power to zone, however, it must exercise that power so as not to violate the state and federal constitutions—"
>
> Page 639:
>
> "* * * If the ordinance discloses *no purpose to prevent some public evil or to fill some public need and has no real or substantial relation to the health, safety or morals, it must be held void*—"

In *Euclid vs. Ambler*, 272 U. S. 365, an Ohio case, this Court held:

> Page 387:
>
> "*The ordinance under review and similar laws and regulations must find their justification in some aspect of the police power asserted for the public welfare* * * *."
>
> "*A regulatory zoning ordinance which would be clearly valid as applied to great cities, might be clearly invalid as applied to rural communities.*"

We have clearly shown that the Zoning Resolution failed to conform with the State Township Enabling Act; that the restriction involved herein is arbitrary, unreasonable and capricious and has no real or substantial relation to the public health, safety, morals, and general welfare, therefore void and repugnant to the State and Federal Constitutions.

Board of Zoning Appeal Without Criteria Void.

7. The Mantua Township Zoning Resolution fails to provide for a Board of Zoning Appeals with power to make variances in specific cases of hardship, fails to provide criteria or standards to guide and control its action in conflict with the State Township Enabling Act and fails to provide for a method of election as provided by the Ohio Constitution. In *State, etc., vs. Gottfried,* 163 O. S. 469, the Court held:

> Syl. 1. "If a zoning ordinance of a municipality does not contain sufficient criteria or standards to guide the administrative officer or tribunal in the exercise of the discretion vested in it, such enactment is unconstitutional and invalid."

All township officers must be elected as provided by the state constitution and Revised Code of Ohio, Sections 503.12, 505.01, 507.01 and 509.01, Section 2, Article X of the Constitution, as amended, reads:

> "The General Assembly shall provide by general law for the election of such township official as may be necessary." (Adopted November 7, 1933.)

Appointment of Members to Board in Conflict With Constitution.

The State Township Enabling Act, Section 519.13 R. C. O., provides for the appointment of members of the Board of Zoning Appeals rather than elect, in conflict with Section 2, Article X of the Constitution. In the case of *State, etc., vs. O'Brien,* 95 O. S. 166, the court held:

> Syl. 3. "A provision in an act of the General Assembly of this state for the appointment instead of election of a county or township officer is in violation of Section 1, Article X of the Constitution." (Section 1 has been changed to Section 2 by amendment.)

The Court of Appeals, in the case at bar, in its opinion held "That members of the Board of Zoning Appeals are public officials * * *." (Appendix B, p. 26). Many other authorities uphold this point and yet the Court of Appeals held that the zoning resolution is not violative of the Ohio Constitution.

8. The Supreme Court of Ohio, affirmed the judgment of the Court of Appeals, made no decision on the constitutional questions properly raised, and proceeded to interpret Section 2731.01, etc., and held (Appendix A, p. 21):

> "* * * relator is asking the court for such a writ to compel respondents to issue to relator a building and use permit, *and at the same time claims that the zoning resolution enjoining the duty is unconstitutional.* Relator did not appeal to the Board of Zoning Appeals from the decision of the Zoning Inspector refusing the permit."
>
> "* * * on relator's application for a permit, the *Zoning Inspector did render a decision refusing to issue it. No further duty remained to be done by him* * * *."

No Need to Appeal to Board of Zoning Appeals.

The Supreme Court cited the case of *State ex rel. vs. Village of Westlake,* 154 O. S. 412, in support of its decision, although that case has no application to the case at bar. In the latter case, the appellant, on being refused a permit, filed his action for a Writ of Mandamus without appealing to the *legally constituted Board of Zoning Appeals which had power to grant the relief requested.* The difference between the case cited and the case at bar is apparent.

Board of Zoning Appeals Had No Power to Grant Relief.

The Supreme Court adopted verbatim the theory of the appellees to the effect that the appellant could not seek a Writ and at the same time challenge the constitutionality of the zoning resolution without first appealing to the Board of Zoning Appeals. In other words, the Supreme Court's ruling is tantamount to saying to the appellant: "Go back and seek relief from the Township Zoning Board of Appeals," even though it has been made clear that there is no legally constituted Board of Zoning Appeals. *A companion case* will best illustrate how justice is administered in that area.

In the case entitled *Coral Lake Club, Inc., et al.,* No. 233, which case is now pending in the Court of Appeals, Seventh Appellate District, involved other property located in the same area and the present appellant is one of the appellants in that case. The appellants in that case, although challenging the legality of the Board of Zoning Appeals, on refusal of a zoning certificate, did appeal to the Board of Zoning Appeals. *The hearing was had on June 15, 1956.* On the Board's refusal, an appeal was perfected to the Court of Common Pleas and on denial of relief in that Court, the case was appealed to the Court of Appeals where it is now held for separate Finding of Facts and Law. It is apparent that the Mantua Township, enjoying the privilege of exercising the police power, has given no regard to the constitutional provisions, both State and Federal, protecting property rights. . .

Remedies Provided by Enabling Act Not Adequate.

The Court of Appeals of Lucas County, Ohio, in the case of *State ex rel. vs. Winterfeld,* reported in 104 O. App., page 260, wherein the validity of the zoning resolu-

tion and the Board of Zoning Appeals were not challenged but the matter was considered solely on the ground whether one must appeal to the Board of Zoning Appeals before being entitled to a Writ of Mandamus, the Court held, on page 264:

> "* * * we determine that where a clear right is shown, the *provisions for such cumbersome appeals do not constitute an adequate remedy at law in this case* * * *."

THIS CASE IS WITHIN THE JURISDICTIONAL PROVISIONS RELIED ON AND THE CASES CITED TO SUSTAIN JURISDICTION.

This appeal is taken pursuant to 28 U. S. C., Section 1257 (2), which section confers appellate jurisdiction on this Court to review final judgments rendered by the highest court of a state in which a decision could be had when there is drawn in question the validity of a statute of the state on the grounds of its being repugnant to the Constitution, and the decision of the state court is in favor of validity as follows:

1. Is a township zoning resolution "a statute of any state?" This Court, in *King vs. Augusta,* 277 U. S. 100, held:

> Syl. 1. "* * * The word 'statute of any state' * * * includes every act, legislative in character to which the state gives it sanction * * *."

2. Is the action of mandamus subject to review? This Court, in *Hartman vs. Greenhow,* 102 U. S. 672, gives an affirmative answer, and held:

> Syl. 1. "Mandamus is subject to review on the same conditions as that in any other action."

3. The judgment in this case is final. The Federal questions were properly raised and considered by the state court but decided adversely to the Federal rights asserted. This Court, in *Indiana vs. Brand,* 303 U. S. 95, sustained the jurisdiction to review the judgment. Also, *Jamison v. Texas,* 318 U. S. 413; *Paulos vs. New Hampshire,* 345 U. S. 395 and *Michigan vs. Calvert,* 347 U. S. 157.

4. When an attack is made against a zoning resolution in its entirety, when it is claimed that there is no legally constituted Board with the power to give relief, must an action challenging its validity be preceded by an application to the Board of Zoning Appeals? The Supreme Court of Ohio held that it must be preceded by an appeal to the Board. This Court, in *Euclid vs. Ambler,* 272 U. S. 365, held that it was not necessary to appeal to the Board.

5. When an application for a zoning certificate has been made and denied; *when the provisions of the resolution expressly made separable any portion declared invalid,* may an appellant challenge the provisions of the resolution? This Court, in *Independent vs. Scheele,* 331 U. S. 70, held, in paragraphs 8 and 9 of its syllabus that a party must first apply for a license before attacking an ordinance on constitutional grounds.

The following cases sustained the jurisdiction of this Court: *Jamison vs. Texas,* 318 U. S. 413; *Paulo vs. New Hampshire,* 345 U. S. 395; *Michigan vs. Calvert,* 347 U. S. 157.

6. While the state courts are the final judicial authority upon the meaning of their statutes, but when their judgments are in conflict with the rights guaranteed by the Federal Constitution, it is plain that this Court has power to protect and enforce such rights. *Greenough vs. Tax,* 331 U. S. 486, Syl. 8.

In the case of *Bradley v. Richmond*, 222 U. S. 477, this Court held, to the effect, that when a statute vests arbitrary discretion in a Board, it is void and unconstitutional. In the case at bar, the Township Zoning Resolution makes no provisions for the duties and powers vested in the Board of Zoning Appeals.

The primary question in this case is whether a Township without inherent constitutional police power (*Yorkavitz vs. Township Trustees*, 166 O. S. 349) may invoke such power and at the same time refuse to comply with the statutory provisions thereof, and restrict private property without any real or substantial relation to the public health, safety, morals and general welfare. This court on many occasions held that even if such power exists, it cannot be used in violation of the protection secured by the Federal Constitution. *Penna. vs. Mahon*, 260 U. S. 393; *Euclid vs. Ambler*, 272 U. S. 365; *Tyson vs. Banton*, 273 U. S. 418; *Nebbia vs. New York*, 291 U. S. 502; *Winters vs. New York*, 333 U. S. 507; *Konigsberg vs. State Bar*, 353 U. S. 252; *Aaron vs. Cooper*, — U. S. — Decided 9/12/58.

The Court of Appeals' refusal to make a separate finding of facts and conclusions of law as required by Section 2505.30 of R. C. O., and thus avoided specific rulings on the Federal questions; the Supreme Court's refusal to rule upon all assignments of error as required by its own decision imposed upon courts below (*Winslow vs. Bus Co.*, 148 O. S. 101), confused the issues before this Court and made matters more difficult and complicated. However, this Court never hesitated to take jurisdiction of a case when a state has deprived a person of a fundamental right secured by the Constitution. In the case of *Craig vs. Harvey*, 331 U. S. 367, the Court, held:

> Syl. 2. "The present case is one of a type in which this Court is required to make an independent exami-

nation of the facts to determine whether a state has deprived a person of a fundamental right secured by the Constitution." (See also *Welling vs. Reuter*, 321 U. S. 671.)

CONCLUSION.

Appellant respectfully suggests that this appeal brings before this Court federal questions under the Constitution which are far reaching and important, to wit:

(a) Whether an Ohio Township, without inherent constitutional police power, may regulate the use of private property without adopting a comprehensive zoning resolution?

(b) Whether a township zoning resolution is valid when it fails to comply with the State Enabling Act and State Constitution?

(c) Whether a township zoning resolution which makes no provision for Height Districts, for a legally constituted Board of Zoning Appeals with power to make variances in specific cases and criteria to guide its actions, and without provisions for its enforcement and penalties, is legal and constitutional?

(d) Whether it is imperative to appeal to the Board of Zoning Appeals the Inspector's refusal to grant a certificate when the Zoning Resolution in its entirety is being challenged?

(e) Whether a party must seek a certificate or license before challenging the constitutionality of the Act which authorizes such certificates when its provisions makes separable any portion declared invalid?

(f) Whether a township zoning resolution may prohibit the use of private property without any real or substantial relation to the public health, safety, morals and general welfare?

(g) Whether Sec. 519.13, 14 of the State Enabling Act, authorizing Townships to appoint rather than elect members to the Board of Zoning Appeals without criteria to guide its action is Constitutional?

(h) Whether Township Trustees are without power to issue a zoning certificate.

The rulings of the Supreme Court of Ohio and that of the Court of Appeals, in the case at bar, answered the questions in the affirmative; that the rulings of the Courts below are in direct conflict with the provisions of the State Laws, State Constitution, and decisions of this Court and the Federal Constitution, 5th and 14th Amendments, and constitute a taking of private property without process of law.

Respectfully submitted,

IRWIN GREENE AND WALTER L. GREENE,
Attorneys for the Appellant,
BY IRWIN GREENE.

APPENDIX A.

OPINION OF THE SUPREME COURT OF OHIO.

Per Curiam. Section 2731.01, Revised Code, provides that mandamus is a writ issued to command the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station, and relator is asking the court for such a writ to compel respondents to issue to relator a building and use permit, and at the same time claims that the zoning resolution enjoining the duty is unconstitutional. Relator did not appeal to the Board of Zoning Appeals from the decision of the zoning inspector refusing the permit.

"An applicant for a building permit, whose application is refused because of the provisions of a zoning ordinance, cannot secure a writ of mandamus, compelling the issuance of such permit on the ground that the ordinance as a whole is unconstitutional, without first exhausting administrative remedies provided by such ordinance if such administrative remedies might enable such applicant to secure the permit." *State, ex rel. Lieux, v. Village of Westlake*, 154 Ohio St., 412, 96 N. E. (2d), 414.

The record fails to disclose a refusal to perform an act specially enjoined upon respondents as a duty resulting from an office, trust or station. On relator's application for a permit, the zoning inspector did render a decision refusing to issue it. No further duty remained to be done by him. There is no duty enjoined by law upon the respondent township trustees to issue zoning permits, and relator makes no such claim.

"To entitle a relator to a writ of mandamus the evidence must show a refusal to perform an act which the law specially enjoins as a duty resulting from an office, trust or station." *State, ex rel. Vaad Hachinuch Hacharedi, v.*

Baxter et al., Cleveland Heights City Planning and Zoning Commission, 148 Ohio St., 221, 74 N. E. (2d), 242.

Relator has not made out a case warranting the issuance of a writ of mandamus. The judgment of the Court of Appeals denying the writ is affirmed.

Judgment Affirmed.

WEYGANDT, C. J., ZIMMERMAN, STEWART, MATTHIAS, BELL and HERBERT, JJ., concur.

TAFT, J., not participating.

APPENDIX B.

OPINION OF THE COURT OF APPEALS.

(Dated October 3, 1957.)

PER CURIAM.

The relator is seeking a writ of mandamus against the three trustees of Mantua Township and the Zoning Inspector to require them to issue to him a permit for the construction of a building to be used as a wholesale hardware store and lumber yard. He also is asking that this Court declare the Mantua Township zoning resolution and its amendments unconstitutional and invalid and seeks damages and other relief.

On February 1, 1955, the trustees adopted the Mantua Township Zoning Ordinance. On March 2, 1955, the trustees at a regular meeting by motion appointed five members of a zoning board of appeals and also a zoning inspector. A copy of this legislation is attached to relator's petition as exhibits.

The relator is the owner of a five acre parcel of unimproved land on the north side of State Route 82 in Mantua Township.

On April 30, 1957, he presented to the inspector plans and specifications for his commercial building, and tendered the $5.00 fee. The inspector refused him a permit for the reason that by the ordinance the use of his land under the zoning resolution is limited to residential purposes only.

The relator in his petition for a writ of mandamus says that the township resolution with reference to the appointment of a township board of zoning appeals as well as Section 519.13, Revised Code, are in direct conflict with Section 2, Article X of the Ohio Constitution, which reads:

"The General Assembly shall provide by general law for the election of such township officials as may be necessary * * *." (Adopted November 7, 1933.)

That the zoning resolution fails to conform to the provisions of R. C. 519.01 in that it is not comprehensive and fails to provide criteria or standard to guide, regulate and control its administration.

That the zoning resolution is void, illegal and unconstitutional for the reason it denies the relator the use of his property without due process of law. (Constitution of United States, Article I, Section 10, and Article I, Section 19, Ohio Constitution.)

To this petition the respondents filed an answer in which they say:

"1. That relator has failed to allege a cause of action in his petition by failing to declare affirmatively that he has no adequate remedy at law.

"2. That relator has an adequate remedy in the ordinary course by appealing from the zoning inspector's decision to the Board of Zoning Appeals and thence, if necessary, to the court of common pleas.

"3. That the zoning inspector has exercised his discretion pursuant to the authority vested in him by the zoning resolution and that the court should not interfere with his judgment in the matter.

"4. And generally deny all the allegations of relator's petition."

Upon leave of court the petition has been amended and now alleges that plaintiff has no adequate remedy at law.

The relator does not attack the procedure or manner in which the zoning resolution was adopted; whether the trustees complied with all the requirements of the township zoning act (Sections 519.01 to 519.99, Revised Code).

All we have before us in the record is the "Mantua Township Zoning Ordinance" so designated and its amendments, and we must assume in the absence of some evidence to the contrary that the trustees complied with all the statutory requirements before adopting the resolution.

There is a presumption of the validity of the resolution as adopted by the trustees. Stipulations 7, 8 and 9 recognize the adoption of the resolution.

It must be borne in mind that the attack on the legislation is not as to the manner of its adoption, but is a direct attack on the substance of the resolution, and the relator contends, among other things, that the resolution with reference to the appointment of members of the township board of zoning appeals, as well as Section 519.13, Revised Code, are in conflict with Section 2, Article X of the Ohio Constitution. The article reads:

> "The General Assembly shall provide by general law for the election of such township officials as may be necessary."

Also the relator contends the resolution is not comprehensive and fails to provide criteria or standard to guide, regulate and control its administration and for that reason is void.

As to all other errors complained of we find no merit.

We hold that the appeal to the Board of Zoning Appeals is not exclusive, and that the relator may seek relief under mandamus and pursue his action. The action in mandamus is much older than any zoning statutes, and is a proper form of action in this case.

It appears to us that this controversy narrows down to the question of whether the Board of Zoning Appeals may be appointed by the township trustees or are they township officials and as such under Article X, Section 2, of the Ohio Constitution elective officials only. In other

words, is Section 519.13, Revised Code, violative of the constitutional provision because it provides for the appointment of the zoning appeals board of five members.

Members of the Board of Zoning Appeals are public officials. They are clothed wtih judicial authority on matters involving business or political dealings between individuals and the public, i.e., clothed with a part of the sovereignty of the state.

However, the fact that they were appointed instead of elected makes them no less a public official. The trustees appointed the zoning board under power conferred by statute, and the statute is not in contravention of the Constitution.

Under the state of the pleadings and the record before us we are unable to say that the resolution is unconstitutional.

A timely request was made for this Court to state in writing the conclusions of fact found separately from the conclusions of law (Section 2315.22, Revised Code). The nine specifications in the record, together with the facts embraced in this opinion, coupled with our conclusions of law, require no further elaboration. Rule IX of Rules of Court of Appeals has application to this request.

This compels the conclusion that the writ must be denied.

Writ denied.

NICHOLS, *P. J.*, Concurs.
GRIFFITH, *J.*, Concurs.
PHILLIPS, *J.*, Concurs.

APPENDIX C-1.

ZONING RESOLUTIONS AND AMENDMENTS.

Proposed Mantua Township Zoning Ordinance

INTERPRETATION AND PURPOSE

The purpose of this resolution is to promote and preserve the general welfare, health, comfort and safety of residents, to prevent concentration of buildings, to reduce fire, health and traffic hazards and to preserve and increase property values.

This resolution shall always be interpreted to carry out and fulfill the above purposes and the provisions shall be held to be the minimum requirements in enforcement hereof.

Any lawful building structure or use existing on Feb. 1, 1955 or whenever a district shall be changed by amendment to this Article, may be continued although such building, structure or use does not conform to the regulations of the district in which it is located.

Nothing in this act shall confer any power on any board of township trustees or board of zoning appeals to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located. And no zoning certificate shall be required for any such building or structure.

Section 1—Districts.

A. In order to designate districts for the purpose of this Article, the Township of Mantua, Portage County, Ohio, is hereby divided into the following district:

Residence Districts	designated by R
Commercial Districts	designated by C
Industrial Districts	designated by I

B. The boundaries of said districts are hereby established upon the map which is designated the official Zoning Map of Mantua Township, Portage County, Ohio, and is on file in the Office of the Zoning Commission. Said Zoning Map is hereby made a part of this Article. No building or structure shall be erected or altered, or shall any building or premises be used for any purpose, other than a use permitted in the district in which such building or premises is located. No building or premises shall be used so as to produce lesser foundation area, smaller yards or less unoccupied area and no building shall be occupied by more families than hereinafter prescribed for such building for the district in which it is located. No lot which is now or may be hereafter built upon as herein required, may be so reduced in area so that the yards and open spaces will be smaller than prescribed by this Article and no yard or open space provided about any building for the purpose of complying with the provisions hereof, shall again be used as a yard, or other open space for any other building.

Section 2—Residence R Districts.

A. Permitted Uses: Within any Residence R District no building, structure or premises shall be used or arranged or designed to be used, except for one or more of the following uses:

(1) A detached dwelling for only one family or for one housekeeping unit.

(2) A detached dwelling for two families or two housekeeping units.

(3) Police and fire stations.

(4) Churches and other places of worship.

(5) Clubs, lodges, social and community center buildings, except those in which a chief activity is a

gainful service or activity, usually conducted as a business.

(6) Institutions of an educational, religious or philanthropic character, other than correctional institutions.

(7) Hospitals and sanitariums, but not for contagious diseases, nor for the care of epileptics or drug or liquor patients, nor for the care of insane or feeble-minded.

(8) Township recreation buildings, township playgrounds and township parks.

(9) Accessory uses customarily incident to any of the above permitted uses but not including the conduct of a business or industry or any driveway or walk giving access to any commercial establishment or industry.

a. The office or studio of a physician, dentist, musician or other like professional person may be located in the dwelling used by such professional person for his residence, provided there is no display visible from the street and any sign board used to advertise such use complies with paragraph (c) of this section.

b. Customary home occupants carried on in the residence of the occupant and not in an accessory building; provided that not more than one-half of the floor area of one story is devoted to such uses; provided further that the provisions of paragraph (9) (c) are met.

c. Signs pertaining to the lease, sale or use of a lot or building may be placed thereon; provided that the total area of all such signs does not exceed eight square feet; provided, further, that on a lot occupied by a dwelling the total area of signs placed on the lot or dwelling and pertaining to the use thereof or bearing the name or occupation of an occupant, shall not exceed four square feet for each family housed. A sign or bulletin board not exceeding twelve square feet in area may be erected upon

the premises of a church, or other institution for the purpose of displaying the name and activities or services therein provided. A non-conforming business use may have exterior signs aggregating not more than twelve square feet in the area on any lot.

B. Foundation Area. No building shall have a ground or foundation area exclusive of open porches, breezeway and garage, of less than 700 square feet for a one story single family dwelling; of less than 600 square feet for a single family two story dwelling; of less than 1400 square feet for a two family one story dwelling; of less than 700 square feet for a two family two story dwelling.

C. Rear Yards. There shall be a rear yard on every lot which rear yard shall have a minimum depth of twenty-five feet.

D. Accessory buildings may be located in the rear yard; provided, such buildings occupy not more than twenty-five per cent of the rear yard area; provided, further, such necessary buildings come not nearer than three feet to any lot line.

E. In case of a corner lot, no wall of any accessory building shall be nearer to a side street line than the side line of the main building and it shall also be as far from the side street line as the setback line fixed by this Article for buildings on the side street lots or as near thereto as the width of the lot will permit.

F. Side Yards. There shall be a side yard on each side of every building except as heretofore provided for accessory buildings. The minimum width of any side yard shall be fifteen feet.

G. Set Back Line. No building shall be erected, reconstructed or altered, so as to project in any manner nearer than 50 feet from the street side line.

H. Steps, uncovered porches and covered but unenclosed porches on the first story which do not extend more than ten feet beyond the front wall of the building are exempt from the foregoing provisions.

I. The foregoing setback line provisions shall apply only along the front lot line.

J. No basement shall be constructed or erected on any parcel of land in this township and be used for dwelling purposes unless a house is completed on top of said basement within three years and the owner agrees to complete said house within three years from the date said basement is occupied.

K. Prohibited Structure. No house trailer, trailer coach, with or without wheels and no tents or cabins for dwelling purposes shall be permitted in this district.

L. No house or building shall be erected on any parcel of land unless the parcel shall have a frontage of 100 feet or more on the street or road on which the house or building faces.

SECTION 3—COMMERCIAL C DISTRICTS.

A. Permitted Uses. Within any Commercial C District, no building, structure or premises shall be used or arranged or designed to be used in any part except for one or more of the following uses:

(1) Retail business. Commercial billboard or advertising signs. Restaurant. Hand Laundry. Ice Delivery Station. Shop for making articles to be sold at retail on the premises. Any other enterprise for profit, for the convenience and service of, and dealing directly with and accessible to the ultimate consumer and being an enterprise not mentioned as prohibited in the Industrial I District and not injurious to adjacent premises or occupants thereof by reason of the

emission of dust, fumes, smoke, odor, noise, vibration or danger to life and property.

(2) Hotels, motels, including services such as newsstands, barbershops and dining rooms, provided there is no exterior display or advertising except such as may be located not less than 50 feet from the road or street line.

(3) A dwelling for any number of families.

(4) Accessory uses as permitted in Residence R Districts.

(5) Public garage. Motor vehicles sales room. Service garage. Filling station. The conduct of any such use shall be limited as follows:

(a) No repairing shall be done within fifty feet of any Residence District.

(b) No entrance or exit shall be within fifty feet of any Residence District.

(c) Petroleum or its derivatives may not be stored above ground in excess of 150 gallons and no appliance for dispensing gasoline, or for oiling or for greasing automobiles shall be located within fifty feet of any Residence District or within twelve feet of any street line.

6. Studio. Office. Retail greenhouse.

(7) Bank. Theatre. Assembly Hall. Dance Hall. Armory. Undertaking Establishment. Small Animal Hospital.

(8) Retail poultry business, either as a main use or as an accessory use, including the storage and killing of poultry or game to be sold entirely at retail upon the premises, directly to the ultimate consumer; provided that the enterprise is conducted in strict compliance with the regulations of the Department of Health and that adjacent premises or the occupants thereof are not injured by reason of the emission of dust, smoke, odors, noise or vibration.

(9) Accessory uses customarily incident to a use authorized by this section but no use prohibited in the Industrial I District shall be permitted as an accessory use.

B. Rear Yards. There shall be a rear yard on every lot which rear yard shall have a minimum depth of twenty-five feet.

C. Accessory buildings may be located in a rear yard, provided the accessory buildings come not nearer than three feet to any lot line.

D. Side Yards. There shall be a side yard on each side of every building or portion of a building used as a dwelling which side yard shall have a minimum width of five feet. Increased by 2 feet for each story above the first floor.

E. Adequate parking areas shall be provided for any building used for commercial purposes.

F. No building or structure shall be erected, reconstructed, or altered so as to project in any manner nearer than 75 feet from the street sideline.

SECTION 4—INDUSTRIAL I DISTRICTS.

A. Permitted Uses. Within any Industrial I District, a building, structure or premises may be used or arranged or designed to be used in any part, for any of the following uses:

(1) Blacksmith or horse shoeing shop.
(2) Dry cleaning.
(3) Bottling works.
(4) Brewing or distilling of liquors.
(5) Coal, coke or wood yard.
(6) Contractors plant.
(7) Flour or grain mill or elevator.
(8) Lumber yard.

(9) Milk bottling or distributing station.

(10) Produce market. Wholesale sale of poultry, the storage and sale of poultry in crate lots, the killing of poultry or game in wholesale quantities.

(11) Rock crusher.

(12) Saw, planing or woodworking mill.

(13) Stable for more than five horses.

(14) Steam laundry.

(15) Stone yard or monument works.

(16) Sand, gravel and concrete processing.

(17) Fabrication and molding of plastics other than celluloid.

(18) Mantua Township Dump.

B. Prohibited Uses. Within an Industrial I District, no building, structure or premises shall be used or arranged or designed to be used in any part for any of the following uses.

(1) Aluminum, brass, copper, iron or steel foundry or works.

(2) Acetylene gas manufacture in excess of 15 pounds pressure per square inch.

(3) Ammonia, bleaching powder or chlorine manufacture.

(4) Asphalt manufacture or refining.

(5) Auto wrecking.

(6) Blast furnace.

(7) Boiler works or forge.

(8) Brick, tile or terra cotta manufacture.

(9) Celluloid manufacture, treatment or storage.

(10) Coke manufacture.

(11) Creosote manufacture or treatment.

(12) Disinfectant or insecticide manufacture.

(13) Distillation of bones, coal, tar or wood.

(14) Dyestuff manufacture.

(15) Dyeing at wholesale.

(16) Explosives, gunpowder, or fireworks manufacture or storage.

(17) Fat rendering.

(18) Fertilizer manufacture.

(19) Gas (heating or illuminating) manufacture or storage except where such gas is to be entirely consumed on the same premises.

(20) Glue, gelatin or size manufacture.

(21) Incineration or reduction of dead animals, garbage, offal or refuse other than garbage, offal or refuse accumulated and consumed without odor on the same premises.

(22) Lamp black manufacture.

(23) Match manufacture.

(24) Lime, cement or plaster of paris manufacture.

(25) Oil cloth or linoleum manufacture.

(26) Pickle, sauerkraut or vinegar manufacture.

(27) Paint, oil, varnish or turpentine manufacture.

(28) Paper and pulp manufacturing.

(29) Printing ink manufacture.

(30) Rayon or cellophane manufacture.

(31) Refining of petroleum or other crude materials.

(32) Rolling mill.

(33) Rubber manufacture from crude materials.

(34) Shoddy manufacture.

(35) Soda ash, caustic soda and washing compound manufacture.

(36) Slaughter houses, exclusive of poultry killing.

(37) Smelting.

(38) Soap manufacture.

(39) Starch, glucose, dextrine manufacture.

(40) Stock yards.

(41) Storage or baling of scrap paper or rags.

(42) Sugar refining.

(43) Storage of dismantled automobiles or any form of junk.

(44) Sulphurous, sulphuric, nitric or hydrochloric acid manufacture.

(45) Tallow, grease or lard manufacture or refining.

(46) Tanning or curing of leather, raw hides or skins, or storage of raw hides or skins.

(47) Tar distillation or manufacture.

(48) Tar roofing or tar waterproofing manufacture.

(49) Tobacco manufacture or treatment for chewing purposes.

(50) Wool scouring.

(51) Yeast manufacture.

(52) Asphalt or coal tar hot-mix manufacture.

(53) Any other trade, industry or use that is injurious, noxious, offensive, or hazardous by reason of the emission of odor, dust, fumes, smoke, noise or vibration.

C. Side Yards. There shall be a side yard on each side of every building. The minimum width of any side yard shall be 25 feet.

D. Rear Yards. In an Industrial I District, along any boundary line between such district and any Residence District, a rear yard shall be required, the minimum depth of which shall be 50 feet.

E. Every building not used exclusively for residence purposes or as an accessory thereto shall provide on such lot adequate space for the loading and unloading of trucks

and commercial vehicles serving such building and adequate parking areas shall be provided.

F. Every building or part of a building shall have a rear yard, the minimum depth of which shall be 25 feet.

G. No building or structure shall be erected, reconstructed, or altered so as to project in any manner nearer than 75 feet from the street side line.

SECTION 5—NON-CONFORMING USES.

A. No building or structure, or the non-conforming use of a building, structure or land shall hereafter be extended or altered unless such extension or alteration shall conform to the provisions of this article for the district in which it is located: provided, however, that a non-conforming use may be extended throughout those parts of the building which were manifestly arranged or designed for such use prior to Feb. 1, 1955 or the enactment of subsequent amendments to this article, if no structural alterations, except those required by law or ordinance, are made therein.

B. Where no structural alterations are made in any building containing a non-conforming use, such use may be changed to one of a similar or higher classification, but no building in which a non-conforming use has been changed to a more restricted use shall again be devoted to a less restricted use.

C. Structural alterations of a building or structure, which does not conform to the provisions of this article, may only be made if the building is being made to conform to the requirements of the district in which it is located.

D. No non-conforming use may be re-established where such non-conforming use has been discontinued for a period of at least two years.

Section 6—General Provisions.

A. Fences or walls may be erected in any Residence District but no fence, wall or shrubbery shall be maintained within 25 feet of any street intersection so as to interfere with traffic visibility around the corner.

B. No gasoline service station or place of business where motor fuels, lubricating oils or motor accessories are sold or motor vehicles are repaired, may be established, constructed or maintained within three hundred feet (300') of any property upon which a church, school, or hospital building is located and in operation, and said distance shall be measured on a straight or air line from the outer margin or boundary of said church, school, or hospital property to the outer margin or boundary of said gasoline service station or place of business. However, this provision shall have no application to, or effect upon, any gasoline service station in existence on Feb. 1, 1955.

D. No zoning certificate for the erection of any building shall be issued before application has been made for a zoning certificate accompanied by plans and specifications and declaration of intended use which shall conform in all respects with the provisions of this ordinance and amendments hereafter duly enacted. The plans and specifications shall include dimensions showing the size and location of the proposed building and other buildings if any on the lot. No construction of any building shall be commenced until the owner of the lot or his agent shall have secured from the zoning enforcement officer such zoning certificate, and no one shall occupy such building until the zoning enforcement officer has given his approval in writing for such occupancy.

SECTION 7—DEFINITIONS.

A. Certain words and terms in this Article are defined for the purposes thereof as follows.

(1) Words and phrases. Words used in the present tense include the future. The singular number includes the plural and the plural includes the singular.

The word "lot" includes the word "plot."

The word "building" includes the word "structure" and shall include tents, and lunch wagons, dining cars, camp cars, or other structures on wheels or other supports and used for business or living purposes.

The word "structure" shall include billboards and advertising signs.

(2) Accessory Use or Building. An accessory use or building is a subordinate use or building customarily incident to and located on the same lot with the main use or building.

(3) Dwelling. Any house or building or portion thereof which is occupied in whole or in part as the home, residence or sleeping place of one or more persons either permanently or transiently.

(4) Garage.

(a) Private garage. A private garage is a building or space used as an accessory to a main building permitted in any Residence District and providing for the storage of motor vehicles and in which no business, occupation or service for profit is in any way conducted.

(b) Public garage. Any garage other than a private garage for the storage of motor vehicles at which repairs on any kind of motor vehicle is permitted or at which the sale of accessories and filling station service is permitted.

(5) Lot. A piece or parcel of land occupied or to be occupied by one main building and its accessory

buildings and including the open spaces required under this Article.

(a) Corner Lot. A lot abutting upon two or more streets at their intersection, provided the angle at which the streets intersect does not exceed one hundred thirty-five degrees.

(b) Interior Lot. A lot, the side lines of which do not abut any street.

(c) Front Lot Line. The front lot line is the line separating the lot from the street. On a corner lot, the owner shall, for the purpose of this Article, have the privilege of electing either street lot line, as the front line, provided it is so designated on the building plans filed for approval with the Township Zoning Inspector.

(d) Rear Lot Line. The lot line opposite and most distant from the front lot line is the rear lot line. The rear lot line on any irregular or triangular lot shall, for the purposes of this Article, be a line entirely within the lot, ten feet long and parallel to and most distant from the front lot line.

(e) Side Lot Line. Any lot line not a front lot line or a rear lot line shall be termed a side lot line. A side lot line separating a lot from a street is a side street lot line.

(6) Non-Conforming Use. A use of a building or land that does not agree with the provisions of this Article for the district in which it is located.

(7) Setback Line. The setback line is a line back of the street sideline between which and the street sideline no building or portion thereof, except as provided in this ordinance, may be erected above the established sidewalk grade at the center of the front of the building.

(8) Yards. A yard is an existing or required open space on the same lot with a principal building and lying along the adjacent lot line, open, unoc-

cupied and unobstructed from the ground to the sky, except as otherwise provided.

(a) Rear Yard. A space, unoccupied, except by a building of accessory use as herein provided, extending for the full width of the lot between the rear lot line and the extreme rear line of a building.

(b) Side Yard. The side yard is the yard along the sideline of a lot and extending from the setback line to the rear yard.

(9) Street. A public thoroughfare more than twenty feet wide, provided, however, that any existing thoroughfare less than twenty feet wide, generally known as a street on Feb. 1, 1955, shall be considered a street for the purpose of this Article.

SECTION 8—VALIDITY.

It is hereby declared to be the intention of the Board of Trustees of Mantua Township, Portage County, Ohio, that the sections, paragraphs, sentences, clauses and words of this Article are severable; and if any word or words, clause or clauses, sentence or sentences, paragraph or paragraphs, section or sections of this Article shall be declared unconstitutional or invalid, by the final judgment or decree of any court of competent jurisdiction, such unconstitutionality or invalidity shall not affect any of the remaining words, clauses, sentences, paragraphs and sections of this Article as the same would have been enacted by the Board of Township Trustees without the incorporation in this Article of any such unconstitutional or invalid word or words, clause or clauses, sentence or sentences, paragraph or paragraphs, section or sections.

WILLIS CARLTON, *Chairman*
FRANCIS HENDRICK *Trustees*
SAMUEL J. ALGER
G. R. PIERCE, *Clerk*

APPENDIX C-2.

Effective Jan. 27, 1956.

CHANGES AND AMENDMENTS TO THE ZONING PLAN.

Adopted by the Township Trustees, Dec. 28, 1955.

Sec. 3—Par. D. SIDE YARDS, amended to read as follows: there shall be a side yard on each side of every building or portion of a building used as a dwelling, which side yard shall have a minimum width of fifteen (15) feet.

Sec. 4—Par. A. Omit Par. 13 and renumber the other paragraphs.

Sec. 5—Par. B. Omit this paragraph and redesignate other paragraphs.

Page 3 on printed copy, omit the word "proposed" from the heading.

Change dates to correct legal date, Feb. 1, '55 as follows:

a. Third Par. on Page 3
b. Sec. 5, Par. A
c. Sec. 6, Par. B
d. Sec. 7, Par. A, sub-paragraph 9

Sec. 2—Par. B. The change will be to read as follows: Foundation Area; No building shall have a ground or foundation area exclusive of open porches, breezeway and garage of less than:

900 sq. ft. for one story single family dwelling
750 sq. ft. for a single family two story dwelling
1800 sq. ft. for a two family one story dwelling
900 sq. ft. for a two family two story dwelling

Sec. 2—Add Par. M to read as follows: No house or building shall be erected on any parcel of land unless the

parcel shall have a ground area of ¾ (three quarters) of one acre (32,670 sq. ft.) or more.

An area ½ (one half) mile square, extending ¼ (one quarter) mile along the center line of each road from the center of the intersection of Chamberlain and Winchell roads, is designated and re-zoned from a Residential R district to a Commercial C District, and the above be added to the official zoning map of Mantua Township.

APPENDIX C-3.

MINUTES OF REGULAR MEETING OF MANTUA TOWNSHIP TRUSTEES.

Held March 2, 1955

Those present were: Carlton, Alger, Hendrick and Clerk Pierce. Also Alden Green, Glenn Carlton, Mr. Nyiri of the Zoning Commission.

The business of the regular meeting was preceded by a meeting to appoint a Zoning Board of Appeals and a Zoning Inspector. The Board of Appeals to consist of five members elected from one to five years each—one term to expire each year—and the following were elected:

Glen Carlton for one year
Earl Monroe for two years
Al Anderla for three years
Ed Lietzow for four years
Mr. Nyiri for five years

Alden Green was elected as Zoning Inspector, and will issue all permits. The charge for a Permit to be $5.00 and turned over to the Twp. Clerk, to be disbursed by her as follows: $3.00 goes to the Inspector, $1.00 to the Twp. Clerk and $1.00 to cover incidental expense, such as printing etc.

It was moved by Alger, seconded by Hendrick to give inspector authority to report to Trustees any infractions of Zoning Code and give notice to property owner or builder. All votes "yes".

(Signed) JESSIE W. PIERCE,
Clerk.

WILLIS CARLTON,
Chairman.

The above is copied from the minutes of Meeting of Mantua Township Trustees held Mar. 2, 1955.

L. J. HIRSCHMANN, SR.,
Clerk, Mantua Township Trustees.

April 27th, 1957.

APPENDIX C-4.

CHANGES TO MANTUA TOWNSHIP ZONING ORDINANCE ADOPTED BY MANTUA TOWNSHIP TRUSTEES AUGUST 1, 1956.

1. That the following area be re-zoned from present classification of Residential R district to Commercial C district: The area along State Route 44, both sides to a depth of ¼ mile, extending south ¼ mile from the intersection of State Route 44 and Winchell Road, and north from the intersection of State Route 44 and Winchell Road to the Geauga County Line.

2. That the Commercial C district presently in existence along State Route 82 west of Mantua Corners be extended west along State Route 82 on either side to a depth of ¼ mile to a line running north and south 400'

east of the intersection of center lines of State Route 82 and Bowen Road.

3. Add to Section 6, paragraph D. "A Zoning Certificate issued by the Zoning Inspector or any other official authorized to issue such certificate will expire and become null and void six months after date of issue unless the foundations for the approved structures are completed."

The above is copy of Changes and Amendments to Mantua Township Ordinance effective August 31, 1956.

L. J. HIRSCHMAN, SR.,
Clerk, Mantua Township Trustees.
April 27th, 1957.

TOWNSHIP OF MANTUA
PORTAGE COUNTY, OHIO

April 27, 1957

Mr. Irwin Greene
1101 Hippodrome Bldg.,
Cleveland 14, Ohio

Dear Mr. Greene:

Enclosed herewith is copy of minutes of meeting of Mantua Township trustees held March 2, 1955, copy of original Zoning Ordinance and changes and amendments thereto now in effect, and proposed changes and amendments showing penciled changes made at hearing before Mantua Township Trustees on March 20, 1957, which changes and amendments were adopted by Township Trustees April 3, 1957 to become effective on May 3, 1957.

Very truly yours,

MANTUA TOWNSHIP TRUSTEES,
L. J. HIRSCHMAN, SR., *Clerk.*

APPENDIX D.

STATE TOWNSHIP ENABLING ACT.

Secs. 519.01 to 519.99.

Ohio Revised Code, Chapter 519: Township Zoning.

§ 519.01 Definition.

As used in sections 519.02 to 519.25, inclusive, of the Revised Code, "agriculture" includes agriculture, farming, dairying, pasturage, apiculture, horticulture, floriculture, viticulture, and animal and poultry husbandry.

§ 519.02 Board of township trustees may regulate location, size, and use of buildings and lands. (GC § 3180-26)

The board of township trustees may regulate by resolution the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lots area which may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of such township, and for such purposes may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones.

§ 519.03 Adoption of resolution of intention to proceed with township zoning. (GC § 3180-27)

Before availing itself of the powers conferred by section 519.02 of the Revised Code, the board of township

trustees shall poss a resolution declaring its intention to proceed under sections 519.02 to 519.25, inclusive, of the Revised Code. The board may act in the following manner:

(A) It may adopt such a resolution upon its own initiative.

(B) It shall adopt such a resolution if there is presented to it a petition, signed by a number of qualified voters residing in the unincorporated area of the township or part thereof to be included in the zoning plan equal to not less than eight per cent of the total vote cast for all candidates for governor in such area at the last preceding general election at which a governor was elected, requesting the board to proceed with township zoning under such sections.

§ 519.04 Township zoning commission. (GC § 3180-28)

The board of township trustees of any township proceeding under sections 519.02 to 519.25, inclusive, of the Revised Code, shall create and establish a township zoning commission. The commission shall be composed of five members who reside in the unincorporated area of the township to be zoned, to be appointed by the board, and the terms of the members shall be of such length and so arranged that the term of one member will expire each year. Each member shall serve until his successor is appointed and qualified. Members of the commission shall be removable for nonperformance of duty, misconduct in office, or other cause by the board, upon written charges being filed with the board, after a public hearing has been held regarding such charges, and after a copy of the charges has been served upon the member so charged at least ten days prior to the hearing, either personally, by registered mail or by leaving such copy at his usual place

of residence. The member shall be given an opportunity to be heard and answer such charges. Vacancies shall be filled by the board and shall be for the unexpired term.

§ 519.05 Recommendations of zoning plan by commission. (GC § 3180-29)

The township zoning commission shall submit a plan, including both text and maps, representing the recommendations of the zoning commission for the carrying out by the board of township trustees of the powers, purposes, and provisions set forth in sections 519.02 to 519.25, inclusive, of the Revised Code.

The zoning commission may, within the limits of the moneys appropriated by the board for the purpose, employ or contract with such planning consultants and executive and clerical assistants as it deems necessary. The zoning commission shall organize, adopt rules for the transaction of its business, and keep a record of its actions and determinations. Members of the zoning commission shall serve without compensation. No township trustee shall be employed by the zoning commission of his township.

The zoning commission shall make use of such information and counsel as is available from appropriate public officials, departments, and agencies and such officials, departments, and agencies having information, maps, and data pertinent to township zoning shall make them available for the use of the zoning commission.

In any county where there is a county or regional planning commission, the zoning commission may request such planning commission to prepare or make available to the zoning commission a zoning plan, including text and maps, for the unincorporated area of the township or any portion of the same.

§ 519.06 Public hearing on recommendations; notice. (GC § 3180-30)

Before submitting its recommendations of a zoning plan to the board of township trustees, the township zoning commission shall hold at least one public hearing, notice of which shall be given by one publication in one or more newspapers of general circulation in the township at least thirty days before the date of such hearing. The notice shall state the place and time at which the text and maps of the zoning resolution may be examined.

§ 519.07 Proposed zoning resolution to county or regional planning commission; approval; public hearing if resolution disapproved; certification to township trustees. (GC § 3180-31)

Following the hearing provided for in section 519.06 of the Revised Code the township zoning commission shall submit the proposed zoning resolution, including text and maps, to the county or regional planning commission of the county or district in which the township is located, if there is such a commission, for approval, disapproval, or suggestions.

The approval of the planning commission shall be conclusively presumed unless, within twenty days after receiving the proposed zoning resolution, it notifies the zoning commission to the contrary.

In the event the planning commission disapproves of the proposed zoning resolution or suggests any material change, the zoning commission shall hold a public hearing on the resolution, due notice of which shall be given as provided in section 519.06 of the Revised Code. When the zoning commission has completed its recommendations for a zoning plan it shall certify the plan to the board of township trustees.

§ 519.08 Public hearing on zoning plan. (GC § 3180-32)

After receiving the certification of a zoning plan from the township zoning commission, and before adoption of any zoning resolution, the board of township trustees shall hold a public hearing on the resolution, at least thirty days' notice of the time and place of which shall be given by one publication in a newspaper of general circulation in the township.

§ 519.09 Changes in text or maps. (GC § 3180-33)

No change in or departure from the text or maps, as certified by the township zoning commission, shall be made unless it is first submitted to the commission for approval, disapproval on suggestions. If such changes are disapproved by the commission, the provision so disapproved must receive favorable vote of the entire membership of the board of township trustees in order to be adopted.

§ 519.10 Trustees to vote upon adoption of resolution. (GC § 3180-34)

After receiving the recommended zoning plan from the township zoning commission and holding the public hearing provided for by section 519.08 of the Revised Code, the board of township trustees shall consider such recommendations and vote upon the adoption of the zoning resolution.

§ 519.11 Zoning plan to be submitted to electors; majority vote required for approval. (GC § 3180-35)

If the zoning resolution is adopted by the board of township trustees, such board shall cause the question of whether or not the proposed plan of zoning shall be put

into effect to be submitted to the electors residing in the unincorporated area of the township included in the proposed plan of zoning for their approval or rejection at the next primary or general election, or a special election may be called for this purpose. Such resolution shall be filed with the board of elections not later than four p. m. of the ninetieth day before the day of election. No zoning regulations shall be put into effect unless a majority of the vote cast on the issue is in favor of the proposed plan of zoning. Upon certification by the board of elections the resolution shall take immediate effect, if the plan was so approved.

§ 519.12 Amendments or supplements to zoning resolution; appeal. (GC § 3180-36)

Amendments or supplements to the zoning resolution may be made as provided by sections 519.02 to 519.11, inclusive, of the Revised Code, except that they may be made without submitting them to a vote of the electors, unless within thirty days after the adoption of the amendment or supplement there is presented to the board of township trustees a petition, signed by a number of qualified voters residing in the unincorporated area of the township or part thereof included in the zoning plan and affected by the amendment or supplement equal to not less than eight per cent of the total vote cast for all candidates for governor in such area at the last preceding general election at which a governor was elected, requesting the board of county commissioners to submit the amendment or supplement to the electors of such area for approval or rejection at the next primary or general election. Any person adversely effected by an order of the board of township trustees adopting, amending, or rescinding a regulation may appeal to the court of common pleas of the county in

which such township is located on the ground that such board of township trustees failed to comply with the law in adopting, amending, rescinding, publishing, or distributing such regulation, or that the regulation as adopted or amended by the board of township trustees is unreasonable or unlawful, or that the revision of the regulation was unreasonable or unlawful.

§ 519.13 Township board of zoning appeals. (GC § 3180-37)

In any township which adopts zoning regulations the board of township trustees shall appoint a township board of zoning appeals of five members who shall be residents of the unincorporated territory in the township included in the area zoned. The terms of all members shall be of such length and so arranged that the term of one member will expire each year. Each member shall serve until his successor is appointed and qualified. Members shall be removable for the same cause and in the same manner as provided by section 519.04 of the Revised Code. Vacancies shall be filled by the board of township trustees and shall be for the unexpired term. The members shall serve without compensation.

§ 519.14 Powers of township board of zoning appeals. (GC § 3180-38)

The township board of zoning appeals may:

(A) Hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of sections 519.02 to 519.25, inclusive, of the Revised Code, or of any resolution adopted pursuant thereto;

(B) Authorize, upon appeal, in specific cases, such variance from the terms of the zoning resolution as will

not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice done.

In exercising the above-mentioned powers, such board may, in conformity with such sections, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have all powers of the officer from whom the appeal is taken.

§ 519.15 Organization; adoption of rules; meetings; minutes and records; appeals to board; hearing; appeal to court of common pleas. (GC § 3180-39)

The township board of zoning appeals shall organize and adopt rules in accordance with the zoning resolution. Meetings of the board shall be held at the call of the chairman, and at such other times as the board determines. The chairman, or in his absence the acting chairman, may administer oaths, and the board may compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board of township trustees and be a public record.

Appeals to the board may be taken by any person aggrieved or by any officer of the township affected by any decision of the administrative officer. Such appeal shall be taken within twenty days after the decision by filing, with the officer from whom the appeal is taken and with the

board, a notice of appeal specifying the grounds. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

The board shall fix a reasonable time for the hearing of the appeal, give ten days' notice to the parties in interest, and decide the appeal within a reasonable time after it is submitted. Upon the hearing, any party may appear in person or by attorney. Any person adversely affected by a decision of a board may appeal to the court of common pleas of the county in which such township is located, on the ground that the decision was unreasonable or unlawful. The court may affirm, reverse, vacate or modify the decision complained of in the appeal.

§ 519.16 Enforcement of zoning regulations; township zoning inspector. (GC § 3180-40)

For the purpose of enforcing the zoning regulations, the board of township trustees may provide for a system of zoning certificates, and for this purpose may establish and fill the position of township zoning inspector, together with such assistants as the board deems necessary, fix the compensation for such positions, and make disbursements for them. The township clerk may be appointed secretary of the township zoning commission, secretary of the township board of zoning appeals, and zoning inspector, and he may receive compensation for such services in addition to other compensation allowed by law.

§ 519.17 Zoning certificate required. (GC §3180-41)

No person shall locate, erect, construct, reconstruct, enlarge, or structurally alter any building or structure within the territory included in a zoning resolution without obtaining a zoning certificate, if required under sec-

tion 519.16 of the Revised Code, and no such zoning certificate shall be issued unless the plans for the proposed building or structure fully comply with the zoning regulations then in effect.

§ 519.18 Regulations not applicable within municipal corporations. (GC § 3180-42)

Regulations enacted by a board of township trustees under sections 519.02 to 519.25, inclusive, of the Revised Code, shall not apply within municipal corporations.

§ 519.19 Nonconforming use of buildings and land not affected by zoning. (GC § 3180-43)

The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued, although such use does not conform with such resolution or amendment, but if any such nonconforming use is voluntarily discontinued for two years or more, any future use of said land shall be in conformity with sections 519.02 to 519.25, inclusive, of the Revised Code. The board of township trustees shall provide in any zoning resolution for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon such reasonable terms as are set forth in the zoning resolution.

§ 519.20 Outdoor advertising classified as business use. GC § 3180-44)

For the purposes of section 519.02 to 519.25, inclusive, of the Revised Code, outdoor advertising shall be classified as a business use and be permitted in all districts zoned for industry, business, or trade, or lands used for agriculture purposes.

§ 519.21 Use of land or buildings for agriculture purposes not affected. (GC §§ 3180-45, 3180-46)

Sections 519.02 to 519.25, inclusive, of the Revised Code confer no power on any board of township trustees or board of zoning appeals to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located, and no zoning certificate shall be required for any such building or structure.

Such sections confer no power on any board of township trustees or board of zoning appeals in respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures of any public utility or railroad, whether publicly or privately owned, or the use of land by any public utility or railroad, for the operation of its business.

Such sections confer no power on any board of county commissioners, board of township trustees, or board of zoning appeals to prohibit the use of any land for the construction of a building, or the reconstruction, change, alteration, maintenance, enlargement, or use of any building for the maintenance and operation of any mercantile or retail establishment, drugstore, hotel, lunchroom, restaurant, or place of entertainment in any area zoned for trade or industry

§ 519.22 County rural zoning regulations to take precedence. (GC § 3180-47)

Where the people of any township or part thereof have approved county rural zoning regulations in accordance with sections 303.02 to 303.25, inclusive, of the Revised Code, prior to the adoption of a zoning resolution

by the board of township trustees, and the township plan includes any area covered by the county rural zoning plan, the zoning resolution adopted by the board of county commissioners shall take precedence over the zoning resolution adopted by the board of township trustees, unless a majority of the voters in such zoned area of the township voting on the issue have voted to have the county rural zoning plan replaced with the township plan of zoning.

§ 519.23 Prohibition against violating resolution. (GC § 3180-48)

No building shall be located, erected, constructed, reconstructed, enlarged, changed, maintained, or used, and no land shall be used in violation of any resolution, or amendment or supplement to such resolution, adopted by any board of township trustees under sections 519.02 to 519.25, inclusive of the Revised Code. Each day's continuation of a violation of this section may be deemed a separate offense.

§ 519.24 Actions instituted to prevent violation of zoning laws or regulations. (GC § 3180-49)

In case any building is or is proposed to be located, erected, constructed, reconstructed, enlarged, changed, maintained, or used or any land is or is proposed to be used in violation of sections 519.02 to 519.25, inclusive, of the Revised Code, or of any regulation or provision adopted by any board of township trustees under such sections, such board, the prosecuting attorney of the county, the township zoning inspector, or any adjacent or neighboring property owner who would be especially damaged by such violation, in addition to other remedies provided by law, may institute injunction, mandamus, abatement, or any other appropriate action or proceeding

to prevent, enjoin, abate, or remove such unlawful location, erection, construction, reconstruction, enlargement, change, maintenance, or use.

§ 519.25 Township zoning plan may be repealed; procedure. (GC § 3180-50)

In any township in which there is in force a plan of township zoning, the plan may be repealed as to such township by the board of township trustees in the following manner:

(A) The board may adopt a resolution upon its own initiative.

(B) The board shall adopt a resolution if there is presented to it a petition, signed by a number of qualified electors residing in the unincorporated area of such township included in the zoning plan equal to not less than eight per cent of the total vote cast for all candidates for governor in such area at the last preceding general election at which a governor was elected, requesting that the question of whether or not the plan of zoning in effect in such township shall be repealed be submitted to the electors residing in the unincorporated area of the township included in the zoning plan at the next primary or general election. Such resolution shall be filed with the board of elections not later than four p. m. of the ninetieth day before the day of the election. In the event a majority of the vote cast on such question in the township is in favor of repeal, then such regulations shall no longer be of any effect. Not more than one such election shall be held in any two calendar years.

§ 519.99 Penalty.

(A) Whoever violates section 519.23 of the Revised Code shall be fined not more than one hundred dollars.

APPENDIX E.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS.

R. C. O. Section 2731.01.

"Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station."

R. C. O. Section 2731.02.

"The writ of mandamus may be allowed by the supreme court, the court of appeals, or the court of common pleas and shall be issued by the clerk of the court in which the application is made. Such writ may issue on the information of the party beneficially interested.

Such writ shall contain a copy of the petition, verification, and order of allowance."

R. C. O. Section 2505.30.

"On the application of a party, made before the journal entry of a final order, judgment, or decree has been approved by the court in writing and filed with the clerk of court for journalization, the court of appeals shall state on the record the conclusions of fact found separately from the conclusions of law."

R. C. O. Section 503.12.

"Upon entering an order under section 503.09 of the Revised Code, creating a new township, the board of county commissioners shall appoint all township officers to serve until the next township election."

R. C. O. Section 505.01.

"In each township there shall be a board of township trustees consisting of three members. Two of such trustees shall be elected at the general election in nineteen forty-nine and quadrennially thereafter, in each township, who shall hold office for a term of four years, commencing on the first day of January next after their election. The third trustee shall be elected at the general election in nineteen fifty-one and quadrennially thereafter, in each township, who shall hold office for a term of four years, commencing on the first day of January next after his election."

R. C. O. Section 507.01.

"A township clerk shall be elected at the general election in nineteen fifty-one, and quadrennially thereafter in each township, and he shall hold his office for a term of four years commencing on the first day of January next after his election."

R. C. O. Section 509.01.

"Such number of constables as are directed by the board of township trustees shall be elected, biennially, in each township. Each constable shall hold his office for a term of two years, commencing on the first day of January next after his election."

Sec. 2, Art. X of Ohio Constitution (Township officers; election; powers). "The General Assembly shall provide by general law for the election of such township officers as may be necessary * * *." (Adopted Nov. 7, 1933.)

APPENDIX F.

PETITION FOR WRIT OF MANDAMUS IN THE COURT OF APPEALS.

Your relator says:

That Mantua Township, Portage County, Ohio, is an unincorporated township, existing by virtue and under the laws of the State of Ohio.

That Willard Carlton, Francis Hendrick and Samuel J. Alger are the duly elected and qualified trustees of said township.

That W. J. B. Avery is the duly appointed and qualified inspector in charge of issuing permits for the construction and use of all real estate.

Relator further says that he filed his Petition in behalf of himself, a citizen of the State of Ohio, and others similarly situated and, that because he was refused a certificate to build and use the property described herein, unless a certificate to build is issued and Relator allowed to use his property, he will sustain serious damage to his property and to his rights, and that he has no other remedy in the usual course of equity and law.

That the relator is the owner of about five acres of undeveloped, vacant, farm land, having a frontage of about 350 feet on State Route No. 82 and running northerly to a depth of about 566 feet, and further known as Sub Lots 4 and 5, being a part of Lot No. 19 in said Mantua Township, Portage County, Ohio.

That on April 30, 1957, the relator presented plans and specifications to build a building and use the aforesaid land for the sale of wholesale hardware and lumber, tendered the usual fee, but the said inspector refused to

issue a permit on the ground that the use of said land is limited for residential purposes only, by zoning resolution; that he has no plain and adequate remedy in the ordinary course of law.

That at the time herein mentioned there was in force R. C. Sec. 519.01 etc. authorizing the Township to invoke the police power of the State of Ohio and enact zoning regulations limiting the use of all real estate; that the R. C. Sec. 519.13 empowered township trustees to appoint five residents to serve as Township Board of Zoning Appeals, with discretionary power, among other duties, to make variances from the terms and conditions of the zoning resolution.

That on February 1 and March 2, 1955, the township trustees attempted to adopt zoning resolutions, regulating the use of all land and buildings, providing, among other things, for the appointment of five residents as a Township Board of Zoning Appeals, with discretionary power to hear appeals and make variance from the terms of the zoning resolutions, etc.; that a copy of said resolutions and amendments, certified as of dates herein mentioned, are marked Exhibits A-1 to A-11, inclusive, and made a part hereof to the same extent as if rewritten herein.

That R. C. Sec. 519.13, and that portion of the Mantua Township resolution with reference to the appointment of members of the Township Board of Zoning Appeals, are in direct conflict with Sec. 2, Article 10, of the Ohio Constitution, as amended, which is as follows:

> "The General Assembly shall provide by general law for the election of such township officials as may be necessary * * *." (Adopted November 7, 1933.)

That the said Mantua Township zoning resolution fails to conform with the provisions of the State Enabling

Act, R. C. Sec. 519.01, etc., in this to-wit: it is not comprehensive and fails to provide criteria or standard to guide, regulate and control its administration, and is illegal in many other respects, and unconstitutional and void.

That the said Mnatua Township resolution and all amendments are void, illegal and unconstitutional by virtue of the provisions of the Constitution of the United States, Article 1, Sec. 10, and of the 5th and 14th amendments thereof, and of the provisions of Article 1, Sec. 19, of the Constitution of the State of Ohio, for the reason that it denies and deprives the relator of the use of his property without due process of law, denies the relator equal protection of the law, in that it takes private property for public use without compensation.

That the said resolution creates a cloud and lien upon said property and reduces and destroys its market value.

That the said resolution and all amendments as aforesaid are invalid, void and unconstitutional.

WHEREFORE, the relator prays that this Honorable Court issue its peremptory writ ordering each of the respondents to issue a permit for the use of the relator's land and for the construction of the building as aforesaid; that this Honorable Court declare the Mantua Township zoning resolution and its amendments unconstitutional and invalid; and further prays for damages and other relief.

IRWIN GREENE and WALTER L. GREENE,

Attorneys for the Relator.

(Duly verified.)

APPENDIX G.

JOURNAL ENTRY OF NOVEMBER 5, 1957.

Nov. 5, 1957. This cause came on to be heard by this Court on the written "MOTION FOR RULINGS CONCERNING THE APPLICATION FOR SEPARATE FINDINGS OF FACT AND CONCLUSION OF LAW," and this Court is asked to make the following orders: —

PART I

"(a) To grant or deny the application for separate findings of fact and conclusions of law filed with the Clerk of Court on October 11, 1957;

PART II

"(a) For an order authorizing the Associate Justice to furnish the relator with facts justifying the statement he made in the written opinion which reads as follows:

'* * * under the state of the pleadings and the record before us, we are unable to say that the resolution is unconstitutional.'

"(b) To order the file and the entire record restored to the Clerk of the Court of Appeals, Portage County, and made available to the relator and his counsel."

Relator's application under Part I (a) is overruled on authority of State, ex rel. Gordon, Appellant, v. Zangerle County Auditor, Appellee, 136 Ohio St. 371, syllabus 7, and the reasoning stated at page 385 of the opinion.

Syllabus 7 reads as follows: —

"Section 12223-30, General Code, which provides for a finding of facts in the Court of Appeals, does not require the Court of Appeals, to make a separate finding of facts, on request of the aggrieved party, in a case tried de novo on an appeal on questions of law

and fact and submitted solely on an agreed statement of facts."

At page 385 of the opinion it is said: —

"The plaintiff duly made request for such a finding which was refused, and, if he was entitled thereto, such a refusal would constitute prejudicial error.

"Section 12223-30, General Code, which regulates this phase of procedure in the appellate court, provides: 'On application of a party objecting to a ruling or decision of the Court of Appeals during the trial, or on motion for a new trial, such court shall find from the evidence and state on the record the facts upon which the alleged error arises, or which may be material in determining whether or not error has intervened.'

"Since this cause was tried de novo in the appellate court on an agreed statement of facts (without evidence in addition thereto) after an appeal had been taken on questions of law and fact, the statute had no application. If the court had acceded to plaintiff's request the factual finding could not have varied substantially from the facts agreed upon by the parties and would merely have encumbered the record with repetitious matter. The law does not require the doing of a vain thing and the plaintiff is not prejudiced by failure to state the essential facts in the record twice."

Relator's application under Part II (a) is overruled. The facts are stipulated by the parties, and there are no other facts before the Court except those stipulated.

Relator's application under Part II (b) is sustained. The complete files in this case have been in the possession of the court for consideration of the instant motion and are now being returned to the Clerk of the Court of Appeals in Portage County.

Exceptions to relator. (Signed by Nichols, Griffith and Phillips, JJ.)

APPENDIX H.

MOTION TO VACATE AND SET ASIDE ORIGINAL DECREE, OR IN THE ALTERNATE TO STRIKE CERTAIN PORTIONS OF THE JOURNAL ENTRY AND RE-HEAR THE ORIGINAL MOTION, WITH AFFIDAVITS.

Now comes the Relator and moves this Honorable Court for the following orders:

I

To vacate and set aside its ruling on the original motion and grant a re-hearing, for the reasons set forth in the Brief; or

II

To strike from its decree certain findings of facts for reasons set forth in the Brief.

IRWIN GREENE and WALTER L. GREENE,
Attorneys for Relator.

AFFIDAVIT OF RALPH IAUS.

STATE OF OHIO,
CUYAHOGA COUNTY, SS.

RALPH IAUS, being first duly sworn according to law, deposes and says that about 1 p.m., May 29, 1957, he was called as a witness in the instant case before the Court of Appeals, sitting in Portage County, Ravenna, Ohio, with the Honorable John C. Nichols presiding; that he was sworn and did testify substantially as follows: That on April 30, 1957, he presented plans and specifications for the construction of a building to be used for the sale at wholesale hardware and lumber, offered the required fee, but the zoning inspector refused the permit because the area was zoned for residence only, although the plans and specifications complied with the laws in all other respects;

that he filed this action in the name of the State of Ohio, for himself and others who are similarly situated and especially for the refusal of the permit to build and use his property; that he was the owner of the property which is located on Route 82, an undeveloped area of farm land in the said township, and that unless a permit was issued he would sustain serious damage without any other remedy of redress; that the original copy of zoning resolution, all amendments and other documents were offered in evidence, but, after discussion with the Court, Mr. Robert E. Cooke, County Prosecutor and Counsel for Respondent agreed that all exhibits attached to the petition may be admitted and received in evidence; that he heard counsel for each side make their opening statement; that during cross-examination, Mr. Cook insisted that the original deed be offered in evidence; that Mr. Greene requested the Court call a recess in order to bring up from the Recorder's Office the original deed, but the Court denied the request and adjourned the hearing and ordered depositions be taken on or before June 15, 1957.

Affiant further sayeth not.

RALPH IAUS.

(Jurat omitted.)

AFFIDAVIT OF IRWIN GREENE.

STATE OF OHIO, CUYAHOGA COUNTY, SS.

IRWIN GREENE, being first duly sworn according to law, deposes and says that in the morning of October 16, 1957, he asked the Clerk of the Court of Appeals, at Youngstown Court House, to see the file in the instant case, but was told that the file and the entire record is in custody with the Clerk of the Court of Appeals, Portage County, Ravenna, Ohio; that on the afternoon of the same

day the Clerk of the Court of Appeals, Portage County, Ravenna, Ohio, informed him that the entire file in the case was not available since the same is in the possession with the Honorable Elmer Phillips.

Affiant further sayeth not.

IRWIN GREENE.

(Jurat omitted.)

APPENDIX J.

NARRATIVE BILL OF EXCEPTIONS.

Be it remembered that heretofore on the 29th day of May, 1957, at approximately 1:00 p.m., before the Honorable Lynn B. Griffith, Honorable John C. Nichols, and Honorable Elmer T. Phillips, Judges of the Court of Appeals, Seventh Appellate District sitting at Ravenna, Portage County, Ohio, the above-entitled cause came on for trial whereupon the following were had:

Ralph Iaus, after being duly sworn according to law, testified as a witness in the above-entitled action before the said Court of Appeals, Honorable John C. Nichols presiding; that said Ralph Iaus testified substantially as follows: that on April 30, 1957, he presented plans and specifications for the construction of a building to be used for the sale of wholesale hardware and lumber, offered the required fee, but the Zoning Inspector refused the permit because the Inspector claimed, the area was zoned for residence only, although the plans and specifications complied with the laws in all other respects; that he filed this action in the name of the State of Ohio, for himself a citizen of the State of Ohio, and others, who are similarly

situated, and especially because he was refused the permit or certificate and denied the right to use his property by the township officials; that he was and still is the owner of the real estate which consists of about 5 acres of land, and located on Ohio State Route No. 82 an undeveloped section, the area being mainly used for farmland in the said township, and further that unless a permit or certificate was issued permitting him to build the building and use the land as set forth in his application for a certificate, he would sustain serious damage to his property and property rights and that he has no other remedy or redress in the usual course of the law; that the original copy of the zoning resolution, all amendments and other documents were offered in evidence, but after discussion with the Court, Mr. Robert E. Cook, counsel for the Respondents, agreed that all exhibits attached to the petition may be admitted and received in evidence, and it was so ordered by the Court; that counsel for the Relator and the Respondents made their opening statements; that during the cross-examination of Mr. Iaus, Mr. Cook requested that Mr. Iaus produce the original Warranty Deed; that Mr. Greene, counsel for the Relator, requested the Court to call a recess in order to bring up from the Recorder's Office the original deed where it was on deposit for recording, but the Court suggested and ordered depositions taken and adjourned the hearing. The Respondents offered no evidence.

Stipulations between the parties were agreed and filed in due time, and it was agreed that the matter be marked as heard and submitted on the pleadings and the evidence.

* * * * *

(Bill of exceptions allowed and signed February 26, 1958 by Nichols, Griffith and Phillips, JJ.)

APPENDIX K.

ANSWER.

Now come the Respondents, Willard A. Carlton, Francis Hendrick, and Samuel J. Alger, Mantua Township Trustees, and W. J. B. Avery, Mantua Township Zoning Inspector, and for their first defense to the Relator's Petition For Writ of Mandamus, say that the Relator has failed to allege a cause of action in said Petition in that he has failed to declare affirmatively that he has no plain and adequate remedy in the ordinary course of law.

For their second defense to Relator's Petition For Writ of Mandamus, Respondents say that as of the date of the filing of this Petition by Relator, the Relator had a plain and adequate remedy in the ordinary course of the law, to-wit: appeal from the Zoning Inspector's administrative decision to the Mantua Township Board of Zoning Appeals; and appeal from the finding of the Mantua Township Board of Zoning Appeals, if the decision of said Board was adverse to the interests of the Relator, to the Common Pleas Court of Portage County, Ohio.

For their third defense, the Respondents further say that the Zoning Inspector of Mantua Township has exercised, in his discretion, his powers as to said application for a building and use permit and that pursuant to the authority vested in him by the Mantua Township Zoning Resolution, he has denied said application. The exercise of discretion imposed upon said Zoning Inspector, having now been exercised, a writ of this Court to compel exercise of discretion would be a vain act.

For their fourth defense to Relator's Petition For Writ of Mandamus, Respondents say that the Respondents, Willard A. Carlton, Francis Hendrick and Samuel J. Alger, as Mantua Township Trustees have, under the terms of

the Mantua Zoning Resolution and the Revised Code of the State of Ohio, performed all duties incumbent upon them relative to any application for zoning permits whatsoever and that no further act on their part could be compelled by this Court to perform any duties.

For their fifth defense, Respondents further deny each and every allegation of the Petition except such as are herein admitted to be true.

Wherefore, having fully answered, Respondents pray that Relator's Petition be dismissed and that they may go hence without delay.

ROBERT E. COOK,

Attorney for Respondents.

(Duly verified.)

APPENDIX L.

STIPULATION.

It is hereby stipulated and agreed between the parties, as follows:

1. That Ralph Iaus is the owner of land described in the Petition for Writ of Mandamus.

2. That the real estate described in the Petition is located and fronting State Route 82, and is undeveloped, vacant farm land.

3. That the said State Route 82 is a main state highway, running in an easterly and westerly direction, and through Mantua Township, Portage County, Ohio.

4. That on April 30, 1957, the Relator presented plans and specifications to build a building and use the aforesaid land for the sale of wholesale hardware and lumber, tendered the usual fee, but the said Zoning Inspector refused to accept the fee, refused to issue a zoning certificate on the ground that the use of said land is limited for residential purposes only by the zoning resolution.

5. That Willard A. Carlton is incorrectly named and should be Willis A. Carlton.

6. That Willis A. Carlton, Francis Hendrick and Samuel J. Alger are the duly elected, qualified and acting Trustees of Mantua Township, Portage County, Ohio.

7. That W. J. B. Avery is a duly appointed, qualified and acting Zoning Inspector of Mantua Township, Portage County, Ohio, in charge of issuing zoning certificates for the use of land and the construction of buildings.

8. That on February 1, 1955 Mantua Township adopted a resolution whereby it attempted to regulate and control the use of land within said Mantua Township, Portage County, Ohio.

9. That on March 2, 1955 Mantua Township adopted a resolution whereby it appointed five citizens to serve on the Board of Zoning Appeals.

IRWIN GREENE,
Attorney for Relator,

ROBERT E. COOK,
Attorney for Respondents.

APPENDIX M.

FINAL DECREE IN SUPREME COURT.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Portage County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellant their costs herein expended taxed at $.

ORDERED, That a special mandate be sent to the Court of Appeals of Portage County, to carry this Judgment into Execution.

FINAL DECREE IN COURT OF APPEALS.

This cause coming on to be heard upon the Petition herein, the Answer thereto, and the evidence, Irwin Greene appearing on behalf of the Relator, and Robert E. Cook, appearing on behalf of the Respondents, the Court finds upon the issue, for the Respondents, and finds that the Relator is not entitled to a Writ of Mandamus against them.

It is therefore considered that the Respondents go hence without day, and recover from Relator their costs herein expended.

To all of which Relator excepts.